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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 118

FOX FILM CORPORATION, APPELLANT,

v.

PAUL H. DOYAL, STATE TAX COMMISSIONER.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

THE OPINIONS OF THE COURTS BELOW

The only opinion rendered by either of the Courts below was the *per curiam* opinion, which the Supreme Court of Georgia handed down on February 27, 1931, stating that the Justices of that Court were equally divided, and that therefore the judgment of the Superior Court was affirmed by operation of law (R. 11). This opinion is reported at 172 Ga. 403.

STATEMENT OF THE CASE

Appellant brought its bill of complaint in the Superior Court of Fulton County, Georgia, against Appellee's predecessor in office, R. C. Norman, State Tax Commissioner, to enjoin the collection of a tax under the Georgia Gross Receipts Tax Act, Georgia Laws 1929, page 103, in so far as such tax was based upon the inclusion in Appellant's taxable gross receipts of royalties from United States copyrights (R. 3). The bill alleges that Appellant during the times in question was the owner and

proprietor of certain copyrights granted by the United States upon motion picture films or productions. It is alleged that as such owner Appellant had the exclusive right to project and exhibit certain films or productions, and to license the same for projection or exhibition (R. 3). The bill alleges further that Appellant granted to various motion picture exhibitors licenses under the copyrights of several photoplays owned by Appellant, whereby the licensees were authorized to exhibit such photoplays under specified conditions (R. 4). The royalties received by Appellant under such licenses are the sums which the State Tax Commissioner claims the right to tax under the Georgia Gross Receipts Tax Act (R. 5). The bill of complaint alleges that the Georgia Gross Receipts Tax Act as thus construed and applied to provide for the taxation of royalties from United States copyrights is unconstitutional, being in violation of Article 1, Section 8, of the Constitution of the United States, and being in effect a tax by one of the several states upon an instrumentality of the United States or the gross income derived therefrom (R. 5, 6). The bill prays for proper decrees temporarily and permanently enjoining and restraining the State Tax Commissioner, his successors in office and agents, from proceeding further with the assessment and collection of the tax (R. 8).

The tax imposed by the Act in question is described in its title as "a tax upon the privilege of engaging in certain occupations," and as "a tax upon certain business and commercial transactions and enterprises." The Georgia Gross Receipts Tax Act provides in separate sections for the taxation of manufacturers, persons engaged in the business of selling tangible property, persons engaged in the business of operating railroads, electric light and power companies etc., persons engaged in the business of operating theaters, opera houses, moving picture shows etc. Then follows Sections 7 of the Act, under which Section the State Tax Commissioner claims the right to tax Appellant on the basis of its royalties from copyrights. Section 7 provides as follows:

"Sec. 7. Be it further enacted that upon every person engaged or continuing within this State in any and every business not included in the preceding sections there is levied and shall be collected a tax equal to two mills on the dollar of the gross receipts of any such business.

"There shall be excepted from the receipts of all persons and/or companies taxed under this Act any amount that may be derived from the business or income of any such person or companies as the State of Georgia is prohibited from taxing under the Constitution of the United States of America."

Section 8 of the Act provides for an annual exemption of $30,000.00 of the gross receipts of persons subject to the tax.

The Defendant filed a general demurrer in the trial court (R. 9), and upon hearing the same was sustained and the bill of complaint was dismissed (R. 11).

The case was taken to the Supreme Court of Georgia upon writ of error (R. 1-3). The Justices of the Supreme Court were equally divided in opinion as to whether the trial court erred in sustaining the demurrer to the petition and in refusing an interlocutory injunction, and the judgment of the trial court was thereby affirmed by operation of law (R. 11, 12). The Chief Justice of the Supreme Court of Georgia handed down a certificate to the effect that the sole issues presented to that Court were the question as to whether the Georgia Gross Receipts Tax Act, supra, should be construed to apply to royalties from United States copyrights, and whether said Act as so construed is violative of the Constitution of the United States (R. 12). The certificate further certifies that these issues were considered by the Supreme Court of Georgia and that the decision and judgment of that Court necessarily involved a holding that the Act should be construed to apply to the receipts in question, and that the Act as thus construed is valid as against the constitutional objections mentioned (R. 12, 13).

An order allowing an appeal to this Court was signed on May 4, 1931 (R. 14, 15). This Court noted probable jurisdiction on October 19, 1931. On November 23, 1931 this Court signed an order substituting Paul H. Doyal, State Tax Commissioner, as Appellee in place of R. C. Norman, resigned.

SPECIFICATION OF ERRORS

1. The Supreme Court of Georgia erred in upholding and sustaining the validity of the Georgia Gross Receipts Tax Act (Georgia Laws 1929, p. 103), as construed to apply to the royalties from United States copyrights described in the bill of complaint, in that said Act as so construed and applied imposes an undue and a direct burden upon Federal instrumentalities, to-wit, copyrights granted by the United States, and unduly and directly interferes with the power conferred upon the Federal Government by Article 1, Section 8, Clause 8, of the Constitution of the United States (R. 13).

2. In said suit there was drawn in question the validity of the statute of the State of Georgia, commonly called the Georgia Gross Receipts Tax Act, approved August 29, 1929 (Georgia Laws 1929, p. 103), on the ground that it was repugnant to the Constitution and Laws of the United States, and the decision of the Supreme Court of the State of Georgia was in favor of the validity of said statute, which decision is hereby specified as error (R. 14).

ARGUMENT

Summary of Argument

Appellant will take the position that United States copyrights are Federal instrumentalities, and that the royalties derived therefrom are not taxable by the States. This principle has only recently been affirmed by this Court in the case of *Long v. Rockwood*, 277 U. S. 142 (1928), involving royalties from patents.[1] Appellant will then urge that a State may not require income or royalties from Federal instrumentalities to be included in the gross receipts forming the measure of a general occupation or privilege tax, which principle was recently affirmed by this Court in the case of *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 U. S. 136 (1927). Even if United States copyrights are to be treated differently from other Federal instrumentalities for tax purposes—which Appellant, of course, does not concede—Appellant will urge further that royalties from United States copyrights must in any event be given no less immunity than receipts from interstate commerce in the application of State gross receipts or occupational taxes. In support of this view Appellant will show that this Court holds receipts from interstate and foreign commerce subject to a State net income tax, while denying to States the right to impose a net income tax on royalties from United States copyrights. Cf. *United States Glue Co. v. Oak Creek*, 247 U. S. 321 (1918) and *Long v. Rockwood*, supra. Appellant will then point out that clearly the Georgia Gross Receipts Tax Act could not apply to receipts from interstate or foreign commerce. *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917); *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments*, 280 U. S. 338 (1930).

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[1]The decision of this Court in the case of Long v. Rockwood has been followed by the Supreme Courts of Tennessee and North Carolina. Quicksafe Mfg. Corp. v. Graham, Comptroller, 161 Tenn. 46, 29 S. W. (2d) 253 (1930); Maxwell v. Chemical Const. Co., 200 N. C. 500, 157 S. E. 606 (1931).

I

Copyrights Granted by the United States are Federal Instrumentalities and the Royalties Derived Therefrom are not Taxable by the States.

In the case of *Long v. Rockwood*, supra, this Court considered the question whether the State of Massachusetts could impose a *net income tax* on royalties received by one of her citizens for the use of patents issued to him by the United States. The Supreme Judicial Court of Massachusetts had held that such an imposition would amount to a tax upon the patent right itself and was prohibited by the Federal Constitution. The case came before this Court on writ of certiorari and the decision of the Massachusetts Court was affirmed. The reasoning of this Court by which it arrived at its decision is expressed in the following language from the opinion of the Court, written by Mr. Justice McReynolds (277 U. S. at 147):

> "The power to exclude others granted by the United States to the patentee subserves a definite public purpose —to promote the progress of science and useful arts. The patent is the instrument by which that end is to be accomplished. It affords protection during the specified period in consideration of benefits conferred by the inventor. And, the settled doctrine is that *such instrumentalities* may not be taxed by the States." (Italics ours.)

There is no basis whatever for urging that any distinction is to be drawn between patents and copyrights, and the royalties derived therefrom, in so far as the present question is concerned. Both the copyright and the patent powers are conferred upon Congress by the Constitution in exactly the same language:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Const., Art 1, Sec. 8, Clause 8.

In the case of *Educational Films Corporation v. Ward*, 282 U. S. 379 (1931), which involved the question whether royalties from copyrights could be included in the measure of the New York corporate franchise tax on net income, it was not suggested that copyrights are to be treated differently from patents with regard to State taxation. The District Court in that case expressly said that since *Long v. Rockwood*, supra, "it cannot be thought that a State may tax directly income from patents or copyrights." 41 F. (2d) 395, 396. The opinion of this Court in that case did not throw the slightest doubt upon the applicability of the principle of *Long v. Rockwood* to royalties from copyrights. In his dissenting opinion, Mr. Justice Sutherland expressly relied upon the proposition that copyrights are instrumentalities of the Federal Government and as such are free from State taxation.

II.

A State May not Tax Income from Federal Instrumentalities Under an Occupation or Privilege Tax Measured by Gross Receipts.

It is urged as a specific ground of the demurrer in this case that the State of Georgia may impose an excise tax upon the privilege of engaging or continuing in business within the State, although such tax is measured by the gross receipts of said business which include royalties from United States copyrights. Appellee's contention is that the so-called gross receipts tax is not a tax on gross receipts, but is simply measured by the amount of gross receipts.[2] Appellee urges that such receipts,

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[2]No importance is attached by Appellee to the words "equal to" in the Georgia Gross Receipts Tax Act. That such words can have no significance is clear from the language of Mr. Justice Holmes in Galveston, H. & S. A. Ry. Co. v. Texas, 210 U. S. 217, 227 (1908):

"The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself."

while not themselves taxable, may nevertheless be taken as the measure of tax on the privilege of earning them (R. 10). The contention which Appellee here makes has been answered conclusively by this Court in a fairly recent case, in which the decision was unanimous:

Northwestern Mutual Life Ins. Co. v. Wisconsin, supra.

In that case the Court had before it a Wisconsin statute which provided, with certain exceptions not here material:

> "Every company . . . transacting the business of life insurance within this state . . . shall . . . pay . . . as an annual license fee for transacting such business . . . three per centum of its gross income from all sources . . ."

The plaintiff sued to recover a tax collected under this Act in so far as said tax was based upon income from United States bonds. Although the tax was stated by the Legislature to be a license fee for transacting the business of life insurance in Wisconsin, it was held that the statute was invalid in so far as it undertook to impose a charge of three per centum upon every dollar of interest received by the company from United States bonds. During the course of its opinion, this Court said (275 U. S. at 140):

> "Accordingly, if the challenged Act, *whatever called*, really imposes a direct charge upon interest derived from United States bonds, it is pro tanto void." (Italics ours.)

And in a number of other cases involving receipts from interstate or foreign commerce this Court has held that a State tax is void, although it is called an occupational or license tax, where it is measured by gross receipts from such commerce.

Crew Levick Co. v. Pennsylvania, supra;

New Jersey Bell Telephone Co. v. State Board, supra.

In the *Crew Levick* case, supra, the Act provided as follows:

"Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually."

Although the tax in that case was declared by the statute to be a license tax, this Court held, in a unanimous decision, that it was unconstitutional in so far as it was measured by gross receipts from foreign commerce.

A distinction should be drawn here between an excise tax which is measured by gross receipts and one which is measured by net receipts from a Federal instrumentality. This Court recently held that royalties from United States copyrights may be included in the *net income* which is the measure of the New York Corporate Franchise Tax. *Educational Films Corporation v. Ward*, supra. In that case this Court pointed out that it was following the decision in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 162 et seq. (1911), which upheld a Federal tax levied upon a corporate franchise, which tax was measured by the entire corporate *net income*, including income from tax exempt municipal bonds.[3]

But Mr. Justice Stone, who wrote the opinion of the Court in the *Educational Films Corporation* case, has clearly recognized and does not question the distinction between an excise tax measured by gross income and an excise tax measured by net income. In his dissenting opinion in *Macallen Co. v. Massachusetts*, 279 U. S. 620, 635 (1929), Mr. Justice Stone said:

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[3]It should be noticed that both the Educational Films Corporation case and Flint v. Stone Tracy Co. involved corporate franchise taxes, rather than general occupation taxes such as the Georgia Gross Receipts Tax. In upholding the tax in the Educational Films Corporation case the three judge district court distinguished the case of Panhandle Oil Co. v. Mississippi 277 U. S. 218 (1928) on the ground that the privilege tax held void in that case was not a corporate franchise tax. Educational Films Corporation v. Ward, 41 F. (2d) 395, 397 (S. D. N. Y. 1930).

"The tax is not measured by gross income as in Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U. S. 136, where the validity of an excise measured by net income including that from tax exempt securities of the United States was recognized. The distinction between net income and gross as the measure of a tax is well established. Peck & Co. v. Lowe, 247 U. S. 165; compare Crew Levick Co. v. Pennsylvania, 245 U. S. 292; United States Glue Co. v. Oak Creek, 247 U. S. 321, 328. Being on net income, the tax does not vary in exact proportion to the gross income from the tax exempt securities included in the aggregate."

And Mr. Justice Brandeis, who was also with the majority in the *Educational Films Corporation* case, recognized the same distinction in his dissenting opinion in *National Life Ins. Co. v. United States*, 277 U. S. 508 (1928). This is clear from the following excerpts from his opinion (277 U. S. at 522, 527, 532):

"Ever since Corporation Tax Act, August 5, 1909, c. 6, Sec. 38, 36 Stat. 11, 112, the United States has laid upon life insurance companies a *special excise tax measured by net income*. . . .

"As the tax imposed by the Act of 1921 is on net income, I should have supposed that it was settled by Flint v. Stone Tracy Co., 220 U. S. 107, 147, 162, that the inclusion in the computation of the interest on tax-exempt bonds . . . would not have rendered the tax objectionable . . .

"I find nothing in the cases cited by the petitioner which lends support to the view that its rights have been violated. Directly to tax the gross income from securities amounts, of course, to taxing the securities themselves. Northwestern Mut. L. Ins. Co. v. Wisconsin, 275 U. S. 136." (Italics ours.)

And finally it must be remembered that the proposition that a State tax, although an excise or privilege tax, is void if

measured by gross receipts which include income from Federal instrumentalities, is supported by *the unanimous decision of this Court* in the case of *Northwestern Mutual Life Ins. Co. v. Wisconsin*, supra. The opinion in this case was written by Mr. Justice McReynolds, who also was with the majority in the *Educational Films Corporation* case.

III

At Least Royalties from Copyrights are no Less Immune from State Taxation than Receipts from Interstate Commerce, and It Is Clear that Receipts from Interstate Commerce Cannot Validly Be Taxed Under the Georgia Gross Receipts Tax Act.

Since *Gillespie v. Oklahoma*, 257 U. S. 501 (1922), it would seem clear that the income from Federal instrumentalities has been placed farther from the reach of State taxation than receipts from interstate or foreign commerce. In that case it appeared that an Oklahoma statute made every person of the State liable to a tax upon his entire *net income* arising from all sources. Oklahoma sought to hold the defendant in that action liable for taxes upon the net income derived by him as lessee of certain restricted Indian oil lands. This Court, speaking through Mr. Justice Holmes, held that the tax was invalid as thus applied since the lessee was "an instrumentality used by the United States in carrying out duties to the Indians that it had assumed." During the course of the opinion of the Court, Mr. Justice Holmes said 257 U. S. at 505):

> "The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. New York, New Haven & Hartford R. R. Co. v. New York, 165 U. S. 628; Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 616. The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. Wil-

liams v. Talladega, 226 U. S. 404, 416, 417, 419; Johnson v. Maryland, 254 U. S. 51, 55."

This Court has given royalties from patents more immunity than receipts from interstate commerce with regard to the taxing power of the States. Thus it has been held that receipts from interstate commerce may be included in the computation of net income subject to a State net income tax. *United States Glue Co. v. Oak Creek*, supra. On the other hand, it was held in *Long v. Rockwood* that a State net income tax could not validly apply to royalties from patents granted by the United States.

In view of the holdings in the two cases just cited, it cannot be supposed that a gross receipts tax may validly apply to royalties from copyrights if it cannot apply to receipts from interstate commerce. And it is clear from the authorities cited below that the Georgia Gross Receipts Tax Act could not validly apply to receipts from interstate commerce.

If Section 7 of the Georgia Gross Receipts Tax Act, under which the tax here in question is claimed, should be properly construed to apply to receipts from interstate or foreign commerce, it would clearly be unconstitutional under the decisions of this Court. It has long been held that gross receipts from interstate commerce are not as such taxable by the States.

Fargo v. Michigan, 121 U. S. 230 (1887);

Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887);

Meyer v. Wells, Fargo & Co., 223 U. S. 298 (1912).

It is true that *net receipts* from interstate commerce may, along with other net income, be subjected to a State net income tax. Although this does in a sense burden interstate commerce, this Court has held that it imposes only a permissible burden. The essential difference between a net and a gross income tax is clearly pointed out in the opinion of this Court in *United States Glue Co. v. Oak Creek*, supra, 247 U. S. at 328-329.

In none of these cases, whether involving a net income tax or a gross income tax, has the Court based its decision upon or placed any reliance upon the smallness or excessiveness of the rate. Net income taxes under the war income and excess profits tax acts, involving extremely high rates on net income, have been upheld as applied to persons engaged in the export trade. *Barclay & Co., Inc., v. Edwards*, 267 U. S. 442 (1924). On the other hand, the gross income tax held invalid in the *Crew Levick* case, supra, was only three dollars plus one-half mill on each dollar of volume. The tax under the Georgia Gross Receipts Tax Act is two mills on each dollar of volume above the thirty thousand dollar annual exemption.

It is clear from authorities already cited that a State tax on gross receipts from interstate or foreign commerce is not saved from constitutional objections because it is in the form of a license or occupational tax measured by such gross receipts.

Crew Levick Co. v. Pennsylvania, supra;

New Jersey Bell Telephone Co. v. State Board, supra.

The taxing statute which was held invalid in the *Crew Levick* case is quoted at page 9, supra.

The Act involved in the *New Jersey Bell Telephone Co.* case was declared by its title to be "for the taxation of all the property and franchises of persons . . . using or occupying public streets, highways, roads or other public places." The Act provided that the tax should be upon such proportion of the gross receipts as the length of line in the streets bears to the length of the whole line. The Act further provided that "the franchise tax shall be in lieu of all other franchise taxes assessed against such taxpayers and their property."

The State Court held that the tax was one on property, "earnings being taken merely as a measure of the value of the franchise of the prosecutor." This Court held that the tax was not a tax on property, nor in substitution for, nor in lieu of, a

property tax, and that therefore the Act imposing the tax was unconstitutional as applied to the gross receipts from interstate and foreign commerce.

The following language from the opinion of this Court in the *New Jersey Bell Telephone Co.* case, 280 U. S. at 346, is applicable to the Georgia Gross Receipts Tax Act as applied to interstate commerce:

> "It is elementary that a State may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a *State may not* tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or *impose a license fee* or other burden *upon the occupation or the privilege of carrying on such commerce*, whatever may be the instrumentalities or means employed to that end. (Cases cited) . . . *This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon.*" (Italics ours.)

In the dissenting opinion of Mr. Justice Holmes in the *New Jersey Bell Telephone Co.* case it was urged that the tax should be sustained as a commutation tax, being "in lieu of all other taxes on intangible property." No question was raised in the dissenting opinion as to the soundness of the principle underlying the *Crew Levick* case, which was decided by a unanimous Court, including Mr. Justice Holmes.

Of course it cannot be suggested that the Georgia Gross Receipts Tax Act might be sustained as a commutation tax.[4] The Georgia Gross Receipts Tax Act does not purport to levy a tax in lieu of or in substitution for a tax on property. On the con-

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[4]Cf. Meyer v. Wells, Fargo & Co., supra, and United States Express Co. v. Minnesota, 223 U. S. 335 (1912), decided on the same day.

trary, the tax by the terms of the Act is described as a privilege, occupational, or license tax. It is not even in lieu of other license taxes. Section 20 of the Act provides:

> "Sec. 20. That the tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder."

It is clear therefore that under the decisions of this Court the Georgia Gross Receipts Tax Act would be invalid as applied to receipts from interstate commerce. And since royalties from patents and copyrights are given a greater degree of immunity from State taxation than receipts from interstate commerce, the Georgia Gross Receipts Tax Act must clearly be held invalid as applied to such royalties.

CONCLUSION

In conclusion it is submitted that under the decisions of this Court in the cases of *Long v. Rockwood* and *Northwestern Mutual Life Ins. Co. v. Wisconsin* the Georgia Gross Receipts Tax Act cannot validly apply to royalties from United States copyrights. The case of *Educational Films Corporation v. Ward* did not in any way question the authority of these two cases. In the *Educational Films Corporation* case this Court merely reaffirmed the principle underlying *Flint v. Stone Tracy Co.* These last two cases involved corporate franchise taxes which were measured by *net income*. In the *Educational Films Corporation* case the measure of the franchise tax imposed by New York for any year was the *net income* of the corporation for the preceding year. An attempt is being made in the case at bar to impose a State *gross receipts tax*, in the form of a general occupational tax, directly upon royalties from United States copyrights. Such an act is clearly invalid on the authority of *Long v. Rockwood* and *Northwestern Mutual Life Ins Co. v. Wisconsin*. It would just as clearly be held invalid upon the authority of *Crew Levick*

Co. v. Pennsylvania and *New Jersey Bell Telephone Co. v. State Board*, even if royalties from United States copyrights were in no better position than income from interstate commerce. It is submitted that the Supreme Court of Georgia has disregarded or ignored the applicable decisions of this Court, and that its judgment should be reversed.

Respectfully submitted,

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